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THE EIGHTEENTH AMENDMENT AND THE VOLSTEAD ACT SUSTAINED.

All the wealth of learning and zeal of argument consumed in the last year in discussions of the validity of the Eighteenth Amendment and the constitutionality of the Volstead Act have at least led up to a decision by the Supreme Court which firmly establishes the validity and constitutionality of both the Amendment and the Act passed in conformity therewith.

But the denouement is an anti-climax. Instead of the great opinion which everyone expected and which everyone believed would take its place beside Marbury v. Madison, Gibbons v. Ogden, and other great cases, we are furnished with no argument at all but a mere catalogue of conclusions, much on the order of the Roman Pandects. The opinion, if such it can be called, is written by Justice Van Devanter and is two pages in length.

The opinion itself, aside from the result reached, constitutes a radical departure from customs hitherto observed by the Supreme Court. Chief Justice White was astounded and expressed "profound regret" that "in a case of this magnitude, affecting as it does an amendment to the Constitution dealing with the powers and duties of the National and State governments, and intimately concerning the welfare of the whole people, the court has deemed it proper to state only ultimate conclusions without an exposition of the reasoning by which they have been reached." Justice McKenna, who objects to the conclusions as well as to the form of the Court's opinion, declares that it is difficult to dissent to an opinion where no reasons are given. "The instance may be a wise one," said Justice McKenna, "establishing a precedent now, hereafter wisely to be imitated." Is this a threat that the majority may be in the minority some day and will be forced to puzzle their brains over similar cryptic expressions of judicial findings. Such a form of opinion writing, declares Justice McKenna, sarcastically, "will undoubtedly decrease the literature of the Court if it does not increase its lucidity."

There are eleven "conclusions" stated in the Court's opinion, only three of which are sanctioned by the citation of authority. These eleven conclusions are as follows:

1. The adoption by both houses of Congress, each by a two-thirds vote, of a joint resolution proposing an amendment to the Constitution sufficiently shows that the proposal was deemed necessary by all who voted for it. An express declaration that they regarded it as necessary is not essential. None of the resolutions whereby prior amendments were proposed contained such a declaration.

2. The two-thirds vote in each house which is required in proposing an amendment is a vote of two-thirds of the members present—assuming the presence of a quorum—and not a vote of two-thirds of the entire membership, present and absent. Missouri Pacific Ry. Co. v. Kansas, 248 U. S. 276.

3. The referendum provisions of state constitutions and statutes cannot be applied, consistently with the Constitution of the United States, in the ratification or rejection of amendments to it. Hawke v. Smith, — U. S. —, decided June 1, 1920.

4. The prohibition of the manufacture, sale, transportation, importation and exportation of intoxicating liquors for beverage purposes, as embodied in the Eighteenth Amendment, is within the power to amend reserved by Article V of the Constitution.

5. That Amendment, by lawful proposal and ratification, has become a part of the Constitution, and must be respected and given effect the same as other provisions of that instrument.

6. The first section of the Amendment —the one embodying the prohibition—is operative throughout the entire territorial limits of the United States, binds all legislative bodies, courts, public officers and individuals within those limits, and of its own

force invalidates every legislative act—whether by Congress, by a state legislature, or by a territorial assembly—which authorizes or sanctions what the section prohibits.

7. The second section of the Amendment—the one declaring "The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation— does not enable Congress or the several states to defeat or thwart the Prohibition, but only to enforce it by appropriate means.

8. The words, "concurrent power," in that section do not mean joint power, or require that legislation thereunder by Congress, to be effective, shall be approved or sanctioned by the several States or any of them; nor do they mean that the power to enforce is divided between Congress and the several States along the lines which separate or distinguish foreign and interstate commerce from intrastate affairs.

9. The power confided to Congress by that section, while not exclusive, is territorially coextensive with the prohibition of the first section, embraces manufacture and other intrastate transactions as well as importation, exportation and interstate traffic, and is in no wise dependent on or affected by action or inaction on the part of the several States or any of them.

10. The power may be exerted against the disposal for beverage purposes of liquor manufactured before the Amendment became effective, just as it may be against subsequent manufacture for those purposes. In either case it is a constitutional mandate or prohibition that is being enforced.

11. While recognizing that there are limits beyond which Congress cannot go in treating beverages as within its power of enforcement, we think those limits are not transcended by the provision of the Volstead Act, wherein liquors containing as much as one-half of 1 per cent of alcohol by volume and fit for use for beverage purposes are treated as within that power. Jacob Ruppert v. Caffey, 251 U. S. 264.

Those who favor short opinions will rejoice over the precedent set by the Supreme Court in this opinion; but we call attention to the fact that one can rejoice over short opinions, where short opinions are called for, and still insist, as the Chief Justice does, that when the Court declares a new principle or construes a new statute, it shall give reasons for its decision. In this very opinion we find no objection to but are delighted with the short form of opinion writing with respect to declarations 1 to 6, inclusive. These points are either self-evident or have been settled by recent authority which fully gives the reasons for the Court's decision. There is no justification for a repetition of these reasons. But with respect to the important question of the meaning of the words "concurrent power," discussed in declarations 7, 8 and 9 and with respect to the proper construction of the word "intoxicating" in declaration number 11, we believe that not only the parties to the case, but the people themselves, are entitled to know the reasons which impelled the Court to the conclusions which it announces.

Fortunately, Chief Justice White discusses quite fully the question of the "concurrent power" of Congress and the states under the Eighteenth Amendment. He sets out the various contentions of counsel and admits that on the surface the words, "concurrent power," seem to imply a veto power in the states with regard to the enforcement of the amendment. "It is true," says the Chief Justice, "that the mere words of the second section tend to these results, but if they be read in the light of the cardinal rule which compels a consideration of the context in view of the situation and the subject with which the amendment dealt and the purpose which it was intended to accomplish, the confusion will be seen to be only apparent."

The Chief Justice then argues that the second section of the Eighteenth Amendment "clearly manifests a purpose to adjust, as far as possible, the exercise of the new powers cast upon Congress by the Amendment to the dual system of government existing under the Constitution. In other words, dealing with the new prohibition created by the Constitution, operating throughout the length and breadth of the United States, without reference to state

lines or the distinctions between State and Federal power, and contemplating the exercise by Congress of the duty cast upon it to make the prohibition efficacious, it was sought by the second section to unite National and State administrative agencies in giving effect to the Amendment and the legislation of Congress enacted to make it completely operative."

This argument, it appears to us, to be very weak. It was not necessary to "unite national and state administrative agencies in giving effect to the Amendment." State executives were already pledged by their oath of office to support the Constitution and laws of the United States. The prohibition leaders stated very clearly their purpose in placing the second clause in the Eighteenth Amendment to be to give the dry states the power, independent of Congress, to enforce the Amendment by *suitable legislation*. It was in fact a grant of power to the legislatures of the several states to legislate on this subject at least, so far as the promoters of this legislation intended, to the extent of providing for its enforcement if Congress failed to act.

The real solution of the problem is to be found, as Chief Justice White has found it, in the fact that the first section of the Amendment is absolute, self-executing and applicable to every State in the Union and not merely to such states which adopt it or approve it, and that the second section gives concurrent power to the states and to Congress, not to nullify the Amendment, but to enforce it. On this point the Chief Justice said:

"Limiting the concurrent power to enforce given by the second section to the purposes which I have attributed to it, that is, to the subjects appropriate to execute the Amendment as defined and sanctioned by Congress, I assume that it will not be denied that the effect of the grant of authority was to confer upon both Congress and the States power to do things which otherwise there would be no right to do. This being true, I submit that no reason exists for saying that a grant of concurrent power to Congress and the States to give effect to, that is, to carry out or enforce, the Amendment as defined and sanctioned by Congress, should be interpreted to deprive Congress of the power to create, by definition and sanction, an enforceable amendment."

All the questions connected with the Eighteenth Amendment are not settled. If the states have concurrent power to enforce the Amendment what will result when as in the northern peninsula of Michigan, the state officer takes jurisdiction and nolle prosses a case? May the Federal Court try the same offense *de novo?* Moreover, suppose Congress should raise the percentage of alcohol to three or four per cent. Would this violate the terms of the Amendment? In other words, does the Supreme Court give Congress the absolute power to define the word "intoxicating" or is there a string tied to this concession to Congress? We shall soon see.

NOTES OF IMPORTANT DECISIONS.

ACCEPTANCE OF BID BY RECEIVER NOT BINDING UNTIL CONFIRMED BY THE COURT.—No question seems to puzzle lawyers more than the obligation of the seller at a judicial sale. The question is not so difficult where the sale is at public auction, but where the Court has previously given its officer, a receiver, trustee, etc., authority to sell at private sale for not less than a certain amount and t receiver enters into a written contract accepting a certain offer, the offeror, being bound, seems to think the receiver should be bound also. It must be borne in mind, however, that the ultimate contract in such cases is with the Court and not with the receiver. This principle is forcibly illustrated by the recent case of Saunders v. Stults, 177 N. W. 516, where the Supreme Court of Iowa held that where a receiver was directed to sell 700 acres of land of parties to a joint adventure and the receiver agreed in writing to sell to a purchaser who had submitted a bid of $102,700, $10,000 in hand, the remainder in deferred payments with assumption of mortgages, and a second mortgage of $27,000, and subsequent-

ly, but before the sale was confirmed by the court, a third party submitted a cash bid of $12,000 more, it was within the power of the court to reject the first bid and accept the second, on the ground that no acceptance by receiver of any bid was binding until confirmed by the Court.

In Terry v. Cole's Ex'r, 80 Va. 695, the Supreme Court of Virginia said:

"Confirmation is the judicial sanction of the court. Until then the bargain is incomplete. * * * Until confirmed by the court, the sale confers no rights. Until then it is a sale only in a popular and not in a judicial or legal sense. The chancellor has a broad discretion in the approval or disapproval of such sales. The accepted bidder acquires, by the acceptance of his bid, no independent right, as in the case of a purchaser at a sale under execution, to have his purchase completed, but is merely a preferred proposer, until confirmation by the court of the sale, as agreed to by its ministerial agent. In the exercise of this discretion a proper regard is had to the interests of the parties and the stability of judicial sales. By sanctioning a sale, the courts make it their own. There is a difference between such sales, and ordinary auction sales, and sales by private agreement. In case of sales before a master, the purchaser is not considered as entitled to the benefit of his contract till the master's report of the purchaser's bidding is absolutely confirmed."

In Davis v. Stuart, 4 Tex. 226, the Court said:

"It will be seen that much discretion is left to the judge; if he should believe that the sale was not fair, or that it was not made in conformity with law, it would be his duty to set it aside, and order it to be sold again. He is not required to place upon the record the reasons by which he is governed either in confirming or rejecting a sale. * * * The purchaser could not be injured; when he bid for the land he was aware that he was purchasing subject to the confirmation or rejection of the sale by the probate judge."

In State v. Quintard, 80 Fed. 829; the Court said:

"The cases, both federal and state, fully establish the rule that Quintard's bid for the property at the special master's sale was only an offer to take the property at that price, and that the acceptance or rejection of the offer was within the sound legal discretion of the court, to be exercised with due regard to the special circumstances of the case. Acceptance of his offer could only have been manifested by an order confirming the sale, and, until that was done, he acquired no title, and there was in his position at the time this petition was filed no element of an innocent purchaser."

THE DOMICILE OF A MARRIED WOMAN—I—THE OLDER VIEW.

I—Interests Involved in Domestic Relations and the Marriage Status.—If all men, like mules, were sterile, organized society would have little interest in the procreative instinct. But sexual intercourse leads naturally to the birth of children, and because of this the State is vitally interested in throwing safeguards around the sex instinct and the living together of men and women in the marriage relation. This for two reasons. The first is that the State does not wish to have children born unless there is someone responsible for their care and nurture. The second reason is, that the history of civilized nations has shown that children are best brought up by those who are their natural parents. Thus the interests of the State are best furthered by developing the home and home life, for within the home the best citizens of the State are trained and developed.

Marriage is the institution which the State sanctions as the proper one within which the sex instinct may be gratified. The law will protect such gratification within the institution and will try to prevent its functioning without the institution. Suits for the restitution of conjugal rights are permitted while adultery and fornication are punished. The family is protected from external interference and pressure is brought to bear upon the heads of families to maintain discipline among and control the activities of, the members of the family.

The Christian churches, in varying degrees, look upon marriage as a sacrament. It has a sanctity over and above that which comes from natural relationships or is granted by law. It is above the law and cannot be dissolved, or should not be dissolved, by the State. The church only, as the representative of the Divine power, can separate man and wife. "Whom God hath brought together, let no man put asunder." But in the eye of the law mar-

riage is a status. It is a status that is predicated upon a legal ceremony and to which certain legal incidents are attached. The ceremony may be civil or religious. Freedom is given to the parties to the marriage to choose what ceremony they please to perform, so long as it is recognized as being a proper one by the church, the community, or the group on which they belong. The one thing insisted upon by the law, for it is contained in all the statutes that control the marriage rite, is that the parties express their intention to take and live with each other as man and wife. The marriage status is not a creation of the parties, nor can it be dissolved by them. It is a legal thing and is imposed by law. The privilege of living together as man and wife is given to the parties, but upon that privilege there are imposed the obligations and duties which the State thinks needful for its own security, the security of members of the State, and the control of the parties within the status. That is, there are certain interests which the State wishes to protect. Law is the means by which the State secures itself and its members.[1] And before one can understand the meaning of and the reason for the law governing the domicile of a married woman, one must find and analyze the interests which the State is seeking to secure by imposing the marriage.[2]

These interests are of five classes: those of the (1) husband, (2) the wife, (3) the children that are born to them, (4) individuals with whom the members of the family deal, (5) the State itself.

The Interests of the Husband.—As against the world at large the husband has the right to the society, affection, chastity and services of his wife. These are the interests which the law secures. He may recover for the alienation of her affections, and for criminal conversation with her. He may recover for the loss of consortium, and for injuries to her which result in the loss of services to him and to the family.

As against the wife the husband has the right to her society. This right was once fully protected by law in that he had control over her physically, and could institute a suit for the restitution of conjugal rights. But it is now seen that such a right cannot be enforced and the interest is, therefore, not secured.

The husband also has a right in the wife's decency, sobriety and moral behavior. his interest cannot, of course, be enforced and so it is not secured specifically. It does not ripen into a right of the husband against the wife. But they are taken cognizance of in such jurisdictions where habitual drunkenness and misbehavior not amounting to adultery and imprisonment for crime are grounds for divorce. Thus though the interest cannot be specifically secured the inability to secure it is the reason for dissolving the marriage tie. In those jurisdictions where incompatibility of temper is ground for a divorce, the more subtle interests of peace, quiet, comforts in homemaking and freedom from annoyance are recognized as being part of the marriage relation, the deprivation of which will be considered when it is asked that the marriage relation be dissolved.

So far as the children are concerned the husband has an interest in their society, custody, control, education and training. He also has an interest in the protection and maintenance of the chastity of his female children. In addition, his interest in the earnings and services of all his children are of primary economic importance. These interests are secured so far as it is expedient to do so. A father no longer has absolute control over his children, but where his interests do not clash, or are not incompatible. with the greater interests of the State in itself and in the children, these interests are secured.

The Interests of the Wife.—Like the husband the wife has interests in the mari-

(1) Jhering: Der Zweck im Recht.

(2) Pound; Individual Interests in the Domestic Relations, 14 Michigan Law Review 177.

tal relation which all the world can be made to respect. These are her interests in the society, affection and chastity of her husband. She also has an economic interest in being supported. Security in the interest of chastity of her husband is denied or only incidentally given, but the other interests are given such protection as the needs of the State will permit, and practical methods in the administration of justice will allow.

The interests which a wife has in her husband are those which relate to his affection and to her economic support. The former is not secured at all, as it is impossible to coerce human love, but the latter is adequately secured, both in equity and at law. She has a right to maintenance and support, and can bind her husband for necessaries, and also prosecute him for non-support.

The interests of the mother in her children are practically the same ones that a father has. These are secured to as large a degree as it is possible. Especially if she is the head of the family, is her right to the control, earnings, services, custody and education of her children conceded. In practice, because of the greater sentimental appeal which she makes, the mother fares better than the father in this respect.

The Interests of the Children.—The interests which the children have are in the affection, care and support which they can get from their parents. They are entitled to maintenance, education, proper care and control. To secure these interests the law gives the children little or no rights against the world at large. In some jurisdictions statutes like "Lord Campbell's Acts," give a little protection, and in other jurisdictions children can recover for injuries they have suffered through the sale of intoxicating liquors to the parents or for losses at gambling.

Against the parents the child practically has no right to support or education, and whatever security he has in these matters are due to moral and social sanctions. Whatever care and education the child can insist upon having is due more to the interest of the State in the education of its future citizens than in the development of the relations between parent and child.

The Interests of Those Who Deal With the Family.—The interests of those who deal with the family in the way of trade and commerce are primarily economic. The persons furnishing the members of the family with food, clothing and shelter want to be secured in a monetary way. This is adequately done in that there is a right against the members of the family individually, and if they are not *sui juris,* then actions can be maintained against the head of the family for necessaries and for such things as the head of the family had directly made himself responsible.

There are, of course, other interests which the outsider has in the family of another in that the activities of the family or of its members may be detrimental to him or his family. But these interests cannot usually be distinguished from the general social interests of the state and they are adequately protected by the same means that protect the general social interests.

The Interests of the State.—The primary interest of the State is to secure to the members of the body politic as many of their interests as it can with the sacrifice of as few as possible. It is inevitable that in each community there should come a conflict of wills and desires. The social instincts are not yet so thoroughly developed that each member of the State knows his place, and finds and sticks to it. Nor is he quite ready to have his own desires delimited and curtailed by the desires of others. Law is still a necessity. It is one of the several necessary means of social control.[3] The State utilizes the law to secure the interests of the individuals and also its own interests. These interests of

(3) Ross; Social Control. Cf. Also Ross, Social Psychology.

the State have to do with the relations of the individuals among themselves, as members of the State and with the State itself as a political institution. The State must conserve and protect itself as a means of fulfilling its function, which function is to further the fullest development, growth and progress of human beings and the social organizations of which they are a part. The individual must be given full opportunity for his development. His freedom to self-expression and growth can be limited only by the like freedom of others and the security of the State.[4] Where the individual in his desires and claims comes into conflict with the desires and claims of another or with the security of the State, his interests must be balanced against the other interests involved, and his interests will be secured or denied as they do or do not more nearly conform to the function of the State than the counterbalancing interests do.[5]

The State also must be secured. The development of human beings, at least during the present generations. cannot be left to the individuals themselves. There must be some social organization which will control their actions. The most centralized of these institutions is the State. It, as the organized power of the community, must be conserved. But this power, thus organized, must not be used arbitrarily; nor can this power be allowed to attain to a rigidity and inflexibility which result in the defeat, through inadequate means, of the functions of the State. Means should never become ends in themselves. When in the course of time methods and instruments stand in the way of human development they should be modified and discarded. Not recklessly and thoughtlessly, to be sure, yet none the less fearlessly. As Mr. Justice Holmes put it in Haddock v. Haddock:[6] "Civilization will not come to an end whichever way this case is decided." The same thing is true of the adoption of new means to meet new conditions of life. There is a sanity about the universe which keeps it steady in spite of occasional cataclysms. If a new means is found inadequate then it can be put aside and another one or even the old one be utilized. The State has its own interests, we have said, but these are merely means to secure the interests of the members of the State. When the mechanics of the State make it impossible for the State to secure to its members their interests, then the interest of the State in its mechanics must yield to the interests of the individuals. After all, law and government are made for man and not man for law and government.

These generalizations hold true for all social institutions. They are especially true of the institution of marriage with the dissolution of which domicile is so closely concerned. In the institution of marriage the State is concerned with securing, so far as it can, the interest of the State in the procreation of children, the interests of the members of the family, the development of these members as good citizens, the mechanics of law by means of which these interests can be secured, and the conservation of the family as a means of social control.

The interest in the family is so great because the history of civilization has shown that human beings best develop in the family community. The interplay of mutual love, tenderness, affection and esteem make for the curbing of the anti-social instincts and of the fostering of social qualities. Education of the young requires all of the virtues which only love possesses. It is assumed that love is the foundation of the family life. The members of the family are one through their mutual affection. This is the psychological truth which underlies the legal fiction that husband and wife are one.

But families are not always harmonious. Some fail to do the things they should do. The socializing qualities are lacking in

(4) Kant; Metaphysische Anfangsgrunde der Rechtslehre, 27.

(5) Pound; Scope of Sociological Jurisprudence. 24 Harvard Law Review.

(6) 201 U. S. 562.

them. When this is so the State will take steps to dissolve the family. When children are uncared for, when husband and wife are not mutually helpful and do not fulfill their obligations to each other and to the State, and the State finds it impossible to compel proper relations between them, the State will grant a divorce to the parties and thus dissolve the marriage status and the family relation.[7]

Yet, so long as the family does exist, it is recognized as a legal institution and for purposes of control there must be some one person who can be looked to as the head of the family. This head of the family is responsible to the law for the proper conduct of the members of the family. Here a difficulty arises. People are migratory. There is a restlessness about human beings that cannot be ignored. They move about and will not "Stay put." Hence, if the law wants to find a person it may have to chase him all over the world, unless the law arbitrarily determined that a certain place should be the legal home of the person. That is, the law as the agency of the State, must be able to say to each person: "This is where you are because this is where you should be." That is the real meaning of giving each person a domicile. The domicile is the legal home. It is the place where the law can act upon the status of the individual no matter where the individual may be *in corpore*. The social interest in the control of the individual makes it imperative that there should be some one place at least where the law could reach that individual.

Of course, the legal home cannot be imposed with total disregard of the right of the individual to "free motion and locomotion."[8] He must be given an opportunity to choose his domicile and to change it as his needs require. But he cannot destroy it nor totally exclude himself from the operation of the law. He must have a domicile somewhere, and if he does not indicate where that domicile is the law will fix it for him.

The meaning of "domicile" in the law is perfectly clear. It means the permanent home of the individual. Permanency, however, is not a matter of time but of intention. Residence in a place with the intention of abandoning the old home and setting up a new one is enough to establish a domicile in the new place.

The idea of the domicile in the Roman law was that it was the place within which the individual carried on his principal business and to which he thought he really belonged.[9] Story says that "by the term 'domicile' in its ordinary acceptation is meant the place where a person lives or has his home. In this sense the place where a person has his actual residence, inhabitancy or commorancy, is sometimes called his domicile. In a strict and legal sense, that is properly the domicile of a person where he has his true, fixed, permanent home, and principal establishment and to which whenever he is absent, he has the intention of returning (*animus revertendi*)."[10]

Westlake is to the same effect[11] and so is Phillimore,[12] while Dicey says: "The domicile of any person is, in general, the place or the country which is in fact his permanent home, but is in some cases the place or country which, whether it be in fact his home or not, is determined to be his home by a rule of law."[13]

These citations show that the law will not impose an arbitrary domicile unless the individual has failed entirely to indicate

(7) Cf. Recent Reports of the Proceedings of Conferences of Charities and Corrections. Reports of the Commission on Uniform Divorce Laws. Pamphlets of the U. S. Treasury Dept.

(8) Spencer; Justice, Ch. 9-18.

(9) "Et in codum loco singulos habere domicilium non ambigitur ubi quis larem, rerumque et fortumarum suarum summam constituit, unde rursus non sit discessurus, si nihil avocet unde cum profectus est, perigrinari videtur; quod si rediit, perigrinari jam destitit." Cod. 10-39-7.

(10) Story; Conflict of Laws (6th Ed.), Sec. 41.

(11) International Law.

(12) International Law (3rd Ed.), Page 42.

(13) Conflicts of Laws (2nd Ed.), Page 82.

where his domicile is to be. That is, it is really a social interest of the State to secure so far as it is possible the individual interest in the free choice of a domicile.

Summing up these sections we find that the State has the following interests in the family institution and the marriage status:

1. An interest in the procreation of children.
2. An interest in the development of the members of the family as individual interests of the members themselves.
3. An interest in knowing where the individuals legally belong.
4. An interest in the education of the members of the family as good citizens of the State. This is the interest of the State in its own security and permanence.
5. An interest in the conservation of the family as a means whereby the preceding interests can be furthered and maintained.
6. An interest in looking at the family as a legal institution which is amenable to law, and the indication of some one member of that family as the head of the family, and so as the person to whom the State may look for the faithful performance of the duties of the family.
7. An interest in giving the family a domicile.
8. An interest in the creation of the family and the means whereby it is created.
9. An interest in the dissolution of the family, should the interests of the State or of the individual members of the family require it, and the means whereby such dissolution may be effected.
10. An interest in the creation and utilization of substitutes for the family when the family is dissolved or divided, and in the means employed in the creation and control of these substitutes.

This preliminary survey having been made, it is the purpose of the following pages to discuss the domicile of a married woman. The specific question asked is this: *"Should a married woman have a domicile of her own for all purposes?"* The answer will depend upon a determination of how far giving her a separate domicile will help to secure the largest number on interests involved in the marriage status with the sacrifice of the fewest of these interests.

The Older View.—The old view[14] is that by marriage husband and wife are one and that one is the husband.[15] Blackstone puts it thus: "By marriage the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated or consolidated into that of the husband."[16]

This view, it is submitted, is the result of two factors. The first is ecclesiastical. After the Christian church had taken control of the institution of marriage it was, of course, swayed by the Pauline doctrine of the subjection of wives to their husbands.[17] The church looked upon marriage as a necessary evil. It was necessary in

(14) Beale: Domicile of a Married Woman, 2 Southern Law Quarterly 93.

(15) Baldwin v. Flagg, 43 N. J. Law 495; Anderson v. United States, 202 Fed. 200; Succession of Daniel Christie, 20 La. An. 383; Colburn v. Holland, 14 Rich. Eq. 176 (S. C. 1876); Cone v. Cone, 61 S. C. 512; Dalhousie v. M'Douall, 7 Cl. & F. 817; In re Daly, 25 Beav. 456; Danbury v. New Haven, 5 Conn. 584; Dolphin v. Robins, 7 H. of L. 389; Dougherty v. Snyder, 15 S. & R. 84; Dow v. Gould, 31 Cal. 629; Faries v. Sipes, 99 Tenn. 298; Guilford v. Oxford, 9 Conn. 321; Greene v. Greene, 11 Pick. (Mass.) 410; Hackettstown Bank v. Mitchell, 4 Dutcher 516; Harrison v. Harrison, 20 Ala. 629; Harvey v. Farnie, 6 P. D.; Henderson v. Ford, 46 Tex. 627; Hood v. Hood, 11 Allen (Mass.) 196; Jackson v. Jackson, 18 Victoria Law Reports 766; Johnson v. Johnson, 75 Ky. (12 Bush) 485; Johnston v. Turner, 29 Ark. 280; Kennedy v. Kennedy, 87 Ill. 250; Knox v. Waldborough, 3 Green (Md.) 455; McGowan v. McGowan, 43 N. Y. S. 745; McKenna v. Brockhaus, 10 Bissels 128; In re MacKenzie (1911), 1 Ch. 578; Maguire v. Maguire, 7 Dana 181; Mason v. Homer, 105 Mass. 116; Masten v. Masten, 15 N. H. 159; Newcombs Executor v. Newcomb, 13 Bush (Ky.) 544; Ogden v. Ogden (1908), P. 46; Parrett v. Palmer, 8 Ind. Appl. 356; Warrender v. Warrender, 9 Bligh (N. S.) 89; Whiting v. Shibley, 127 Md. 113; In re Wickes, 128 Cal. 270; Williams v. Saunders, 5 Cold. (Tenn.) 60; Wingfield v. Rea, 77 Ga. 84; Wilmer v. Spicer, 152 N. W. 767; Winslow v. Troy, 97 Me. 130; Yelverton v. Yelverton, 1 Sw. Tr. 574; Brook v. Brook, 13 L. R. D. 9 (New South Wales); Halket v. Halket, 1 L. R. D. 12; Jewell v. Jewell, 30 W. N. 130 (New South Wales); Parker v. Parker, 8 L. R. 509; 5 C. L. R. 691; Cables v. Cables, 32 N. Z. L. R. 178; McCortie v. McCortie, 23 N. Z. L. R. 126; Walker v. Walker, 28 N. Z. L. R. 917; Edwards v. Edwards, 20 Gr. 392 (Ontario); Morcombe v. M'Lelland, Ferg. 264 (Scotland); Packer v. Packer, 3 Tasmania L. R. 5.

(16) 1 Bl. Com. 441.

(17) Paul's Epistle to the Ephesians, 5: 22.

that it prevented the greater evils of fornication and adultery. The church in its zeal to keep the souls of men unspotted from the world, and in its belief that the physical instincts should be overcome and destroyed so far as that was possible, neglected to observe and to realize that the very factors which make up the Christian spirit, which spirit the church was avowedly trying to foster, were most developed within the family life. The church wanted to destroy the body to save the soul. Failing in this, it made the best of a bad situation, and, looking upon the woman as the temptress of man, from the days of Adam and Eve down, it placed the woman under the control of the man. And when the State courts took over the control of the marriage status it also took over the idea of the subjection of the wife to her husband.

The second factor was probably this: In the seventeenth and the early part of the eighteenth centuries, the jurists and text writers tried to find a general principle that would explain the legal position of women and children. The Blackstonian phrases do explain the actual conditions of Blackstone's time. With the usual conservatism which permits the Courts to retain a principle or rule of law long after the reason for its existence has vanished, the old rule has been followed until very recent times, without regard to changing conditions and circumstances.

As the husband is in legal contemplation the only thing that exists, he is naturally the head of the family, when the law takes cognizance of the family as a legal institution. Where he is, is, therefore, the place where the family is. And as he must have a domicile somewhere, the place where he has his domicile is the domicile of the members of his family who are not sui juris. That is, the husband must establish the family home and the wife and children must live in it.[18]

(18) Codoni v. Codoni, 6 Cal. App. 83; State v. Flower, 27 Ida. 223; Babbitt v. Babbitt, 69 Ill. 277; Isaacs v. Isaacs, 71 Neb. 537; Cone v. Cone, 61 S. C. 512.

There is, of course, a good argument to be made in favor of this position. It is well stated by Crosbey, Surrogate, when he says: "If a married woman is to be given the right to choose her own residence, then the husband's right in that regard should be made subservient to her wish, in order that the home, the very foundation of society, may have a local habitation, without which it is but a name, and meaningless at that. Either the husband or the wife must have the final say in the matter of where their home is to be; and so long as the husband is burdened with the responsibility of feeding and clothing the family, the wife and children, that very responsibility ought to carry with it the authority to determine the location where his toil will earn its best reward for their benefit.

No statute ought to repeal the laws of nature. Man, by reason of his superior physical strength and the fact that he does not bear the children, must ever be the one to bear arms in war, and upon him must always fall the responsibility of providing for the family. The burden of his responsibility is the secret of his authority. And the legislature has not intended to go so far as to say that he shall be responsible for the care and maintenance of one who owes him no allegiance whatever. If, in addition to all her conceded rights, woman may now select her own home and domicile, it is hard to see where she has a single duty to perform for the one who becomes a disorderly person, under the Penal Code, the moment he neglects or refuses to earn her living for her by the sweat of his brow. If we have emancipated women to the extent claimed by the executors herein, the process of emancipating man ought now to begin."[19]

And says Prof. Beale in regard to the above argument: "It is not necessary to accept every sentiment herein expressed, but the soundness of the main argument is

(19) In re Bushbey, 112 N. Y. S. 262.

undeniable." Other judges and text writers talk in the same way, and the strength of the argument will be conceded gladly if the interests which are impliedly secured by the language used will be recognized, and if the rule will not be applied in such cases where it is obvious that the interests involved are not secured, but are obviously ignored if not destroyed.

The proper reasoning, it is submitted, which supports the rule that the domicile of the wife is that of her husband is this:

The man wishes to expand his personality and to gratify his physical instincts by entering into the marriage relation. The State says to him: "We shall allow you to enter into this relation which we shall legally recognize, as the status of marriage. But as you enter into this relation you must assume certain duties, which we impose upon you. You must provide for your wife and children. You must see to it that they have opportunities to expand as individuals, and you must protect them from danger and harm. Furthermore, you must help them to become good citizens of the State, and if you do not help them do this, we shall see to it that, at least, you do not hinder them in this regard.

"As you are under a duty of providing for your family, we grant to you the right to go to such places where you can get the best results from your labors, as out of the fruits of your labors must the provision for your family come. We shall compel your wife and children to go with you and help you, so far as it is possible for us to do so, when we consider their interests and our interest in them as as individuals and as members of the State. You must make the home and they must live in it. Wherever you go they must go. Whatever control we have over them shall, so far as it is possible, be exercised through you. Hence, your domicile must be their domicile."

And it is urged that the right to fix the domicile which the husband has is one which carries with it the duties to secure the interests of the wife and to act as a means of control over her as an agent of the State. The right cannot and should not be exercised unless the duties are discharged. And it is well settled law that so long as the duties are discharged, and even at times when they are not (with which last we quarrel), the domicile of the wife is that of her husband, and when he changes it during marriage, her domicile it drawn to his.[20]

But in the cases where the marital duties are not discharged and it is still held that the domicile of the wife is that of the husband it is submitted, that there has been either a slavish following of precedents without considering the situations or the facts in the cases cited as precedents, or else, that the interests of the wife were outbalanced by the other interests involved.[21] An analysis of several typical cases will show this to be true.

(20) McKenna v. Broackhouse, 10 Biss 128; Anderson v. U. S., 202 Fed. 200; Dow . Gould, 31 Cal. 629; In re Wickes, 128 Cal. 270; Dean v. Dunn, 9 Cal. App. 352; Banbury v. New Haven, 5 Conn. 584; Wingfield v. Rea, 77 Ga. 84; Ilo v. Ramey, 18 Ida. 642; Ashbaugh v. Ashbaugh, 17 Ill. 476; Kennedy v. Kennedy, 87 Ill. 250; Parett v. Palmer, 8 Ind. Appl. 356; Petty v. Petty, 42 Ind. App. 443; McAfee v. Kentucky University, 7 Bush (Ky.) 735; Knox v. Waldoborough, 3 Me. 455; Winslow v. Tory, 97 Me. 130; Whiting v. Shipley, 127 Md. 113; Mason v. Homer, 105 Mass. 115; Wilmer v. Spicer, 152 N. W. 767; Baldwin v. Flagg, 43 N. J. L. 495; In re Hartman's Estate, 70 N. J. Eq. 664; Liscomb v. N. J. R. R. & T. Co., 6 Lans. (N. Y.) 75; In re Bushbey, 112 N. Y. S. 262; Gout v. Zimmerman, 5 N. C. 440; Smith v. Moorehead, 6 Jones Eq. (N. C.) 360; Dougherty v. Snyder, 15 S. & R. (Pa.) 84; Hunnings v. Hunnings, 55 Pa. Sup. Ct. 261; Cone v. Cone, 61 S. C. 512; Williams v. Saunders, 5 Cold. (Tenn.) 60; Faries v. Spies, 99 Tenn. 298; McClellan v. Carroll, 42 S. W. 185; Warrender v. Warrender, 9 Bligh (N. S.) 89, 103.

(21) The wife cannot during the existence of the marriage acquire a domicile of her own; Blake v. Nelson, 29 La. Ann. 245; First National Bank v. Hinton, 123 La. 1018; Smith v. Moorehead, 6 Jones Eq. (M. C.) 360; Dolphin v. Robins, 7 H. L. C. 390; even though she is living apart from her husband by reason of his fault; Harrison v. Harrison, 20 Ala. 629; Neal v. Her Husband, 1 La. Ann. 315; Richardson v. Richardson, 2 Mass. 153; Hopkins v. Hopkins, 3 Mass. 158; or by his consent; Clements v. Lacy, 51 Tex. 150; Warrender v. Warrender, 9 Bligh (N. S.) 89, 145; nor if she has long ceased to dwell with

The three leading English decisions to the effect that the domicile of the wife is that of her husband are Dolphin v. Robins,[22] Warrender v. Warrender,[23] and Yelverton v. Yelverton.[24] The first of these cases will be considered later when divorce is taken up; the other two cases will be taken up now.

On the authority of these three cases Dicey does not grant a wife a domicile of her own for any purposes. He says: "Though a wife may acquire a home for herself, she can under no circumstances have any other domicile or legal home than that of her husband.[25] But Warrender v. Warrender is on the facts of the case an authority that the domicile of the wife is that of her husband *only when the husband is still supporting the wife.* In this case the husband is Scotch and the wife is English. The marriage took place in England. He was domiciled in Scotland. At the time of the marriage the wife took the domicile of the husband. Later there was an agreement made between them to separate, *and the estates of the husband were charged to support the wife.* Later still the wife goes to France to live. Then the husband sues for divorce in Scotland, his own domicile, on the grounds that his wife had committed adultery in France. The wife was personally served in France. It was held that the Scotch court had jurisdiction to grant the divorce as the domicile of the wife was in Scotland. On the facts the case was rightly decided. The husband was fulfilling his duties. He was supporting his wife. In return he is given the right to say where the domicile of the family is even though they have agreed to live apart. It is obviously just that so long as the husband fulfills his duties he is to fix the domicile.

Yelverton v. Yelverton was also justly decided. In that case the husband was domiciled in Ireland, but deserts his wife while they were in France. She comes to England, her own pre-marriage domicile, and sues in the English courts for *restitution of conjugal rights.* She was told that the courts had no jurisdiction over the matter. And rightly so. For she wanted to have the duties which were imposed upon the husband by the marriage status *enforced.* For this purpose the law must look to the place where the static duties are to be enforced, that is to the domicile of the husband. *The wife is not asking that her personal interests be conserved as an individual but as a wife.* She does not want the marriage dissolved. She wants it enforced. All that the case really decides is that if the wife wants to have marital duties enforced she must go to the domicile of the husband to have them enforced. The case should not be taken as an authority that the wife cannot have a domicile of her own for any purposes and under any circumstances. But the cases have been followed blindly, it is submitted, as laying down the rule that even in a suit for divorce the wife must sue at the domicile of the husband.

An analysis of other cases lead to some interesting results. Some do flatly decide that the domicile of the wife is that of

him and occupies a separate dwelling house: Johnson v. Turner, 29 Ark. 280; Davis v. Davis, 30 Ill. 180; Greene v. Windham, 13 Me. 225; Hood v. Hood, 11 Allen (Mass.) 196; McPherson v. Housel, 2 Beas. (13 N. J. Eq.) 35; Jackson v. Jackson, 1 Johns (New York) 424; Pauldings Will, 1 Tuck (New York) 47; Van Buren v. Syracuse, 131 N. Y. S. 345; Lacy v. Clements, 36 Tex. 661; Essex v. Jericho, 76 Vt. 194; Edwards v. Edwards, 20 Grant (Ont.) 392; Parker v. Parker, 5 Comm. L. R. (Australia) 691; Boyd v. Boyd (1913), Victoria L. R. 282; and even if the wife does not live at the domicile of her husband; Kashaw v. Kashaw, 3 Cal. 312; Babbitt v. Babbitt, 69 Ill. 277; Allen v. Allen, 175 Ill. App. 220; McCollem v. White, 23 Ind. 43; Maguire v. Maguire, 7 Dana (Ky.) 180; Gugat v. Markham, 2 La. 29; Succession of Christie, 20 La. An. 383; Succession of McKenna, 23 La. An. 369; Burlen v. Shannon, 115 Mass. 438; Hairstone v. Hairstone, 27 Miss. 704; Smith v. Smith, 19 Neb. 706; Hackettstown Bank v. Mitchell, 4 Dutcher (28 N. J. L.) 516; Colburn v. Holland, 14 Rich. Eq. (S. C.) 176; Russell v. Randolph, 11 Tex. 460; Yelverton v. Yelverton, 1 Sw. & Tr. 574.

(22) 7 H. L. C. 389 (1859).

(23) 9 Bligh (N. S.) 89.

(24) 1 Sw. & Tr. 574.

(25) Conflicts of Laws, Page 134.

her husband. But an analysis of the interests which are secured by these decisions shows that usually the interests of the wife or the social interests of the State are protected. Some comment will be made on four classes of these cases. These are: (A) where there are claims to homestead lands made by the wife; (B) where the pauper settlement of the wife is in question; (C) where there is an assessment of taxes on the property of the wife; (D) where the wife has left the husband or refused to follow him without cause.

The Homestead Cases.—In Anderson v. United States,[26] it was held that the residence of the wife was in law the residence of the husband. Here the wife claimed a a right to homestead land, but it was shown that she had actually lived on the homestead land of her husband and only occasionally visited the land she was claiming. She was not allowed to keep the land. Here the interest which was secured was that of the State in having its lands made productive. It was this interest which overbalanced the interest which the wife might of had in having a separate residence. She did not reside on the land and so did not get it. (Here it will not be amiss to note that the courts use the word "residence" as synonymous with the word "domicile" and it is excedingly difficult to know just what it is they mean. In the instant case it may be that the *residence* requirement was not fulfilled and the case has nothing to do with domicile at all.)

In the Succession of Daniel Christie,[27] it is the interest of the wife in her husband's labor which is secured. Here the husband goes to Louisiana from his domicile in New York. He takes up a domicile in the first named place and gets homestead land there. He dies in Louisiana. The wife claims the land, although she has never been on the land; she gets it. It is said that her domicile is that of her husband, and she can take under the Homestead Act.

(26) 202 Fed. 200
(27) 20 La. An. 383.

In Johnson v. Turner,[28] the Court said: "The domicile of the wife and minor children follows that of the husband, and their actual personal residence at the homestead place is not necessary to perfect the right in him or to entitle them to the benefit of it after his death." * * * "The homestead estate is created equally for the benefit of the wife and children and none of them can do an act that will impair or prejudice the rights of the others." Here the economic interests of the wife and children are being secured. It should further be noted that in this case there is no question of the husband failing to fulfill his marital duties.

Pauper Settlements.—In the cases dealing with pauper settlements it is generally held that when a married woman becomes a pauper she is taken care of by the same settlement where her husband is domiciled. Here, it is submitted, it is clear that the interests secured are those of the State in protecting the wife as an individual, and in determining where the substitute for the husband as a means of support is to be found. The husband is supposed to look after the wife. He does not do so. She cannot look after herself. The State then must do it. And it is reasonable to say that as the husband would have been held accountable for the wife's support at his domicile that his domicile be saddled with the burden of taking care of the wife. There is nothing inherent in the structure of Nature that this should be so, but it is simply held to be just that as a woman belongs at a certain place legally that that place look after her when she cannot be looked after by her own relations. The substitute for the husband must assume his burdens.

Where Wife Dies Leaving Personal Property.—The reasons for making the domicile of the husband the domicile of the wife in the pauper settlement cases holds good also for the class of converse cases where the wife dies leaving personal property. Her domicile for taxation is said to

(28) Johnson v. Turner, 29 Ark. 280.

be that of her husband's. As the domicile of the husband would be held responsible for the maintenance of the indigent wife, it is only fair that, if the wife dies in affluence, that whatever benefits the State may have from such affluence should go to the community which would have had to support the wife if she had been a pauper. Here, too, there is no inherent logic which makes such a rule imperative, but it is simply a practical and fair rule in a matter which has to be governed by a fixed method of procedure.

The Wife Leaves the Husband Without Cause.—In situations where the wife has left the husband through no fault of his, it is obvious that there is no reason for changing the old rule of identity of domicile. The husband is fulfilling, or is ready to fulfill, his duties and the State has no reason for taking the privilege of fixing the family domicile away from the husband. There is no reason why a wife should be allowed to profit by her own wrongdoing. If the State is not able to prevent the wrong it can at least not assist in giving any privileges to the wrongful person. If there are personal individual interests of the wife which to some extent are not secured by making her domicile remain with her husband, these interests must be sacrificed in order that the other interests involved might be secured.

These four classes by no means exhaust the types of cases where the domicile of the wife is held to be that of her husband, but the cases are very few in which the rule was applied simply because it was the rule. Nearly all of the cases were rightly decided when the balancing of the interests involved are considered.

Putting the matter differently we can say, that so long as the reasons which can support the rule are present the rule is enforced, but when the reasons for the rule begin to disappear the rule is relaxed and is gradually done away with. And, of course, it follows that with the increased and increasing emancipation of the wife from the control of the husband, and with the increasing of the legal rights and duties of the wife and children the rule will be less and less enforced. For a growing number of purposes the wife is allowed a domicile of her own. A consideration of some of these purposes and the interests connected with them will now be undertaken.[29]

ALBERT LEVITT.

Cambridge, Mass.

(29) The discussion of this subject will be continued in the next issue of the Journal, and will treat of the domicile of a married woman for purposes of divorce and all other purposes.

MASTER AND SERVANT—SERVANT OPERATING AUTOMOBILE.

RILEY v. STANDARD OIL CO. OF NEW YORK.

Supreme Court, Appellate Division, Second Department. April 16, 1920.

181 N. Y. Supp. 573.

Where a truck driver, instead of driving from depot where truck had been loaded to employer's factory pursuant to directions, drove in the opposite direction on a personal errand and injured plaintiff before returning to the route between the depot and the factory, the employer was not liable.

KELLY, J. The accident in which the infant plaintiff met with his injuries occurred at a time when the driver of defendant's truck was engaged, contrary to his instructions, in a personal errand. He was instructed to go to the railroad station, to load his truck with barrels of paint, and to return to the factory of the defendant. Instead of doing this, having loaded his truck, he proceeded in an opposite direction to carry some wood, gathered in the railroad yard, to his sister's home entirely as a personal brotherly service. Having delivered the wood to his sister, he turned his truck around to come back to his legitimate employment and route, and had proceeded but a short distance in the street in which his sister resided, when he ran over the plaintiff. The point at which the accident occurred was not between the railroad station and defendant's factory, but beyond

the station, in the opposite direction. Under these circumstances, his acts while on this personal, unauthorized trip were not the acts of his employer or within the scope of his employment. The connection between the master and servant was broken while he was engaged upon that unauthorized trip for his own personal ends and purposes. Reilly v. Connable, 214 N. Y. 586, 108 N. E. 853, L. R. A. 1916A, 954, Ann. Cas. 1916A, 656; O'Brien v. Stern Brothers, 223 N. Y. 290, 119 N. E. 550; Fallon v. Swackhamer, 226 N. Y. 444, 123 N. E. 737. We think the ruling in Jones v. Weigand, 134 App. Div. 644, 119 N. Y. Supp. 441, should not be extended beyond the facts in that case.

The judgment and order should be reversed, with costs, and the complaint dismissed, with costs. This court unanimously reverses the finding of negligence upon the part of defendant implied in the verdict of the jury. All concur.

NOTE.—*Liability of Owner of Automobile for Injury by an Incompentent.*—The use by one not a servant or agent of the owner of an automobile was in the early days of this instrumentality somewhat differently regarded than now.

In Steffen v. McNaughton, 142 Wis. 49, 124 N. W. 1016, 26 L. R. A. (N. S.) 382, 19 Ann. Cas. 1227, it was said of automobiles that: "The dangers incident to their use as motor vehicles are commonly the result of the negligent and reckless conduct of those in charge of and operating them, and do not inhere in the construction and use of the vehicles." But, when we remember that many states have provisions in their laws requiring that not every one, but only one qualified by age or expert knowledge, lawfully may drive on the streets an automobile, there is implied a statement in legal policy, that an automobile is an instrument inherently dangerous. There is a suggestion that the owner should not allow it to come into use by any and everyone.

In Slater v. Advance Thresher Co., 97 Minn. 305, 107 N. W. 133, the opinion proceeds upon the assumption that unauthorized use was by one qualified as an expert, to-wit the chauffeur servant of the owner. And so are many other cases.

But suppose that an operator of an automobile is intoxicated. In New York Highway Law such a one is prohibited from operating an automobile. Lincoln Taxicab Co. v. Smith, 150 N. Y. Supp. 86. Now it is readily conceivable that an owner permitting an intoxicated person to operate an automobile on the highway could be held liable. But is it not true that an owner must guard his automobile against surreptitious use by a disqualified person or be liable for consequences?

It has been held that a law providing for liability of an owner of an automobile for any injury caused by one to whom an owner has loaned it is constitutional. Stapleton v. Independent Brewing Co., 198 Mich. 170, 164 N. W. 520. The Court said: "It is true that the automobile has become so perfected that it may not be classed as a 'dangerous instrumentality,' when intelligently managed. It will not shy, balk, back up or run away when properly directed, but may do all of these things when managed by an incompetent, or reckless, driver. When in control of such a one it becomes an exceedingly destructive agency as the daily toll of lives and the many injuries to persons chronicled by the newspapers attest. * * * The owner is supposed to know and should know about the qualifications of the persons he allows to use his car." But it was not said it was a matter of defense for an owner to show that a person using a car by consent of owner was competent. It seems to me that it would certainly be far more in the reach of police power specifically to hold an owner for the use of an automobile insufficiently guarded against its being operated by an incompentent person. Indeed, a statute of this sort ought not to be needed to fix responsibility of an owner for its being operated by an incompetent person.

In Lynde v. Browning, 2 Tenn. C. C. A. 262, there was considered the right of forfeiture of a machine that was being used by one who had stolen it and it was said: "Forfeiture of instrumentalities that have occasioned harm is one of the oldest principles of jurisprudence. This conception inheres in the English and American systems of jurisprudence." While it was said that no lien might attach for damages unless the operator was agent or servant of the owner, yet it was constitutional to make an owner, where a machine in the hands of a thief does damage, liable to the extent of the value of the machine.

But, if this be so, *a fortiori* it seems to me that if an incompetent operates a machine, whether with knowledge and consent of the owner or not, the owner ought to be held on the theory that he must guard against its coming into the possession of an incompetent.

C.

ITEMS OF PROFESSIONAL INTEREST.

PROGRAM OF THE MEETING OF THE OHIO BAR ASSOCIATION.

The forty-first annual meeting of the Ohio Bar Association will be held at the Hotel Breakwater, Cedar Point, Ohio, July 6, 7 and 8, 1920.

The President's address will be delivered by Mr. Smith W. Bennett, of Columbus. Sir James Aikens, K. C., President of the Canadian Bar Association, of Winnipeg, will also deliver an address. Hon. Charles S. Thomas, U. S. Senator from Colorado, will address the Association on the subject of Federal Encroachments.

There will be the usual committee reports.

PROGRAM OF THE MEETING OF THE KENTUCKY BAR ASSOCIATION.

The eighteenth annual meeting of the Kentucky Bar Association will be held at Henderson, July 14th and 15th.

The president's address will be given by Mr. Lewis Apperson, of Mount Sterling. The annual address will be delivered by Hon. Selden P. Spencer, of St. Louis. Other addresses will be given as follows: "The Income Tax," by Mr. Robert Miller, of Louisville; "The Work of the 1920 Legislature," by Mr. John Blue, of Marion, Ky.; "Some Great Lawyers of Kentucky," by Mr. W. L. Porter, of Glasgow, Ky.; "The Application of the Scintilla Rule by the Courts," by Mr. S. D. Rouse, of Covington, Ky.; "The Seventeenth and Eighteenth Amendments to the Constitution of the United States and the Effect Thereof," by Mr. Malcolm Yeaman, of Henderson, Ky.

BAR ASSOCIATION MEETINGS FOR 1920—WHEN AND WHERE TO BE HELD.

American—St. Louis, August 25, 26 and 27.
Arizona—El Paso, Tex., July 1, 2 and 3.
Colorado—August 20 and 21; probably Colorado Springs.
Indiana—Indianapolis, July 7 and 8.
Kentucky—Henderson, July 14 and 15.
Minnesota—St. Paul, July 27, 28 and 29.
Missouri—St. Louis, December 3 and 4.
New Mexico—El Paso, Tex., July 1, 2 and 3.
Ohio—Cedar Point, July 6, 7 and 8.
South Dakota—Sioux Falls, August 4 and 5.
Texas—El Paso, July 1, 2 and 3.
West Virginna—Wheeling, July 28 and 29.
Wisconsin—Milwaukee, September 28, 29 and 30.

BOOKS RECEIVED.

Occasional Papers and Addresses of an American Lawyer. By Henry W. Taft, of the New York bar. 1920. The Macmillan Company. Price, $2.50. Review will follow.

The Nature of the Corporation as an Entity, with especial reference to the law of Maryland. By James Treat Carter, Ph.D., of the Baltimore Bar. M. Curlander. Baltimore. 1920. Price, $3. Review will follow.

HUMOR OF THE LAW.

In court a few days ago some colored gentlemen were being questioned for the purpose of ascertaining their fitness for jury service.

"I can't serve on dis jury, Judge—no, suh," said Clarence Green.

"Why not, Clarence?"

"Well, suh, my mind's done made up—yes, suh—"

"Is that so, Clarence? Since when has your mind been made up?"

"Well, suh, Judge, you might say ever since the incipiency of my information, suh, yes, suh."—*New York Evening Post.*

"The courts of justice in the mountains are not always show places of the English language," says Gov. Morrow of Kentucky, "but native judges who may know that L.L. B. does not mean 'lie like blazes,' often let fall gems of speech."

Lou Lewis, a Circuit Judge of the upper Kentucky River section in the mountains, always made the occasion of a charge to the grand jury one of expounding every law on the statute books with local applications mixed in. Incidentally, each of his charges was a political speech, for the Judge was a constant condidate for office. On the occasion that comes to mind, his concluding charge was this:

"Gentlemen of the jury: A most heinous crime has been called to the attention of this court. You all know the Piney Grove meetin' house. The godly elders and deacons thereof, in the goodness of their hearts, went down to the banks of the middle forks of the Kentucky and with great care selected a fine lot of water maples and brung 'em back and planted 'em in the meetin' house yard. Them trees growed and flourished and was doin' fine, but, gentlemen of the jury, observe the perversity of mankind.

"A few wild bucks on a Sunday rid their nags up to the meetin' house and, ignorin' the hitchin' post on the outside, rid their beasts into the yard and hitched them to the aforesaid maples, and while the congregation inside wuz a-singin' sweet songs of Zion, them thar beasts chawed all the bark off uv them thar trees and to-tilly destroyed them.

"Gentlemen of the jury, I say to you that a man who would do the like uv that would ride a jackass into the Garden of Eden and hitch him to the Tree of Life. Indict 'em, gentlemen, indict 'em."—*Post-Dispatch.*

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Adverse Possession**—Forcible Entry and Detainer.—The actual possession that will support an action for forcible entry or detainer is the same kind of actual possession that will in time ripen into good title, and is determined by the same rules as in any other action.—New York-Kentucky Oil & Gas Co. et al. v. Miller et al., Ky., 220 S. W. 535.

2. **Alteration of Instruments**—Materiality.—Material alteration of negotiable instrument by party to it, as by reducing amount without consent of maker, renders instrument void, and it cannot be enforced even by a subsequent purchaser in good faith without notice, whether the alteration is injurious or beneficial to the party liable.—Keller v. State Bank of Rock Island, Ill., 127 N. E. 94.

3. **Bankruptcy**—Avoiding Transfer.—Bankruptcy Act, § 70e, providing that "the trustee may avoid any transfer by the bankrupt of his property which any creditor of the bankrupt might have avoided, and may recover the property so transferred," merely vests the trustee with the same rights possessed by the creditor under the state law, and confers on him no additional rights.—Davis v Willey, U. S. D. C., 263 Fed. 588.

4.——Bulk Sales Law.—Where, within four months of bankruptcy, defendant, without compliance with the Bulk Sales Law, purchased a bankrupt's stock of goods, the stock belonged to the trustee as against defendant, and defendant's purchase rendered him liable to the trustee in trover.—Philoon v. Babbitt, Me., 109 Atl. 817.

5.——Insurance.—An order denying petition of a trustee to require bankrupt to deliver up a policy of life insurance or pay its surrender value held a bar to a later application to require him to surrender the policy or pay its loan value.—In re Samuels, U. S. C. C. A., 263 Fed. 561.

6.——Salaries.—Salaries, not unreasonable in amount, voted and paid by the directors of a corporation, who also owned a large majority of its stock, to certain officers of the corporation for past services, without objection by any stockholder or creditor, held not recoverable by the trustee on behalf of subsequent creditors, on bankruptcy of the corporation more than ten years later.—In re Franklin Brewing Co., U. S. C. C. A., 263 Fed. 512.

7. **Banks and Banking**—Admission of Signature.—A statement by a bank cashier that a check was good admits that the signature of the drawer was genuine, and that there were sufficient funds on deposit to cover the amount named in the check, but not that the amount was that originally written by the drawer.—Central Nat. Bank v. F. W. Drosten Jewelry Co., Mo., 220 S. W. 511.

8.——Certifying Check.—The "certification of a check" by the bank on which it is drawn is equivalent to the acceptance of a bill of exchange, and implies that the check is drawn upon sufficient funds in the bank's possession, that they have been set apart for its satisfaction, and that they shall be so applied whenever the check is presented for payment.—McAdoo, Director General of Railroads, v. Farmers' State Bank of Zenda, Kan., 189 Pac. 155.

9. **Bills and Notes**—Attorney Fees.—It is no defense to a claim for attorney's fees in a suit on a note that, before the finding thereof and before giving defendant the 10 days' notice required by statute, the payee had already sued defendant on the note, and that such suit is pending at service of such statutory notice, but had been dismissed before the finding of second suit.—Lang v. Hall, Ga., 102 S. E. 877.

10. **Boundaries**—Adjoining Owners.—Boundary line agreement by adjoining owners having had bona fide dispute as to location thereof, followed by possession with reference to the boundary so fixed, is conclusive on the parties, although the possession may not have been for the full statutory period, it being sufficient to show that the dividing line was actually established and thereafter recognized or acquiesced in by the parties for a considerable time.—Holbrooks et al. v. Wright et al., Ky., 220 S. W. 524.

11. **Bribery**—Tender of Money.—A baggage porter, employed by a railroad under the control of the federal government by virtue of Act Aug. 29, 1916, is acting on behalf of the United States in an "official function," so that

offering or giving him money to induce him to deliver a trunk to one not the owner is a violation of Crimnial Code, § 39.—Krichman v. United States, U. S. C. C. A., 263 Fed. 538.

12. **Carriers of Goods**—Perishable Property.—In an action for damages to fruit during shipment, the measure of damages is the difference between the market value of the fruit in good condition at place of destination and the market value in damaged condition at such place; the price at which they were subsequently sold in small lots at another place by the one who bought them being immaterial.—Garry et al. v. Los Angeles & S. L. R. Co. et al., Utah, 189 Pac. 71.

13. **Charities**—Gifts.—Courts of equity favor gifts to charity, and if the mode pointed out for carrying into effect the gift fails, the court will provide another mode by which it will take effect.—Jansen v. Godair et al., Ill., 127 N. E. 97.

14. **Chattel Mortgages**—Bill of Sale.—An instrument in the form of a bill of sale, reserving title to personalty sold, cannot be properly treated as a mortgage merely because providing that, on payment of notes as they became due, title to an automobile should be in the buyer, with a warranty title thereto.—Roddenberry v. Fouche, Ga., 102 S. E. 869.

15. **Conspiracy** — Husband and Wife.— If defendant conspired with his wife and another woman to steal an automobile, he was guilty of conspiracy, regardless of whether the machine was actually stolen.—Dalton v. People, Col., 189 Pac. 37.

16. **Contracts** — Consideration.—Promise to send one to school or college for services being rendered did not create a contract, where there was no agreement how long services were to be performed, or to what school or college the person rendering the services was to be sent, and for what length of time.—Kuhlmann's Estate v. Poss, Tex., 220 S. W. 564.

17.——Offer and Acceptance.—If an offer is accepted as made, the acceptance is not rendered ambiguous or conditional by uniting with it an expression of hope or suggestion that some unimportant addition or modification be made in its terms.—E. T. Barnum Iron Works v. Prescott Const. Co., W. Va., 102 S. E. 860.

18.——Reasonable Time.—Generally what is a reasonable time is a question to be passed upon by the jury, but where the facts are undisputed and different inferences cannot be drawn from them, the question as what is a reasonable time is one for the court.—American Realty Co. v. Bramlett, Ga., 102 S. E. 873.

19. **Conversion**—Equity.—Where a testator authorizes executor to sell real estate, and it is apparent from the general provisions of the will that he intended it to be sold, although the power of sale is not in terms imperative, the intention to convert the estate will be implied.—McCormick v. McCormick, Ill., 127 N. E. 78.

20. **Corporations** — Nonassessability.—Representation that stock is nonassessable is assurance that the company has taken all steps necessary to waive right to levy statutory assessments, and is a representation of fact, which if false entitles the subscriber to rescind and is a complete defense to an action on the subscription.—Merchants' Realty & Investment Co. v. Kelso, Cal., 189 Pac. 116.

21. **Covenants**—Incumbrance.—The covenant against incumbrance is a covenant as to things existing at the time it is made. If broken at all, it is broken the moment it is made, and the cause of action then exists, which does not pass by force of any conveyance purporting to grant the premises.—Beecher v. Tinnin, N. M., 189 Pac. 44.

22.——Lex Rei Sitae.—The law of the place where the land is situated governs in determining the effect of a covenant running with land.—Langford v. Newsom, Tex., 220 S. W. 544.

23. **Criminal Law**—Impeachment.—In view of the facts of the case, a charge that a witness may be impeached by contradictory statements, and that that is one of the methods if impeachment recognized by the law, held erroneous, as not giving a full and more adequate instruction thereon; although no request to do so or to charge on the subject was presented.—Williams v. State, Ga., 102 S. E. 875.

24.——Instructions.—A defendant has the right to insist that the court shall instruct on all legal questions necessary to reach a true verdict.—Kocher v. State, Ind., 127 N. E. 3.

25.——Reasonable Doubt.—A charge that reasonable doubt does not mean mere vague conjecture or possibility, conjured up to acquit the defendant, but such a doubt as arises in the mind of an honest juror seeking the truth, and leaves it doubtful as to truth of a transaction, and that it may arise from having heard the case and the want of weakness or insufficiency of the evidence, was not error.—Newsome v. State, Ga., 102 S. E. 876.

26.——Self-Serving Statement.—It was not error to exclude testimony of a witness for accused that, after accused had gone a quarter of a mile from place of the homicide, he said "he would go back and stay until somebody came," where he did not go back, as the declaration would have been a self-serving one and not part of the res gestae.—McBride v. State, Ga., 102 S. E. 865.

27. **Damages**—Loss of Earnings.—In personal injury suits, plaintiff may recover for loss of earnings or profits in his business, provided such earnings or profits are ascertainable with reasonable certainty.—Ganz v. Metropolitan St. Ry. Co., Mo., 220 S. W. 490.

28. **Death**—Presumption of Care.—A pedestrian killed by a train at a crossing is presumed, prima facie, to have been using proper care.—Jones v. St. Louis-San Francisco Ry. Co., Mo., 200 S. W. 484.

29. **Deeds** — Defeasance.—Conditions, when they tend to defeat estates, are to be construed strictly; this being particularly true in the case of conditions subsequent relied upon to work a forfeiture.—Blackwood Improvement Co. v. Public Service Corporation of New Jersey, N. J., 109 Atl. 820.

30. **Disorderly House**—Character of Visitors.—On a prosecution for keeping a house of ill-fame testimony showing the character of those who visited it and what they said and did while there is competent to show the character of the place.—State v. Rogers, Minn., 177 N. W. 358.

31. **Divorce**—Abandonment.—Indecent proposals by a husband to his daughter-in-law held sufficient to justify his wife in abandoning him, so that he could not secure divorce for desertion.—Knight v. Knight, Tex., 220 S. W. 609.

32.——Equity.—A divorce suit is a proceeding in equity, and the chancellor has full supervision of the trial, and is not incumbered by rules of procedure with the same strictness as in jury trials.—Cole v. Cole et al., D. C., 263 Fed. 633.

33.——Indignities.—A husband who cooked several meals a day and whose wife was absent a number of nights, without more, held not to have suffered such indignities as to warrant a decree of divorce.—Pierce v. Pierce, Mo., 220 S. W. 506.

34. **Eminent Domain**—Discontinuing Proceeding.—City may discontinue street extension condemnation proceeding at any time prior to payment or deposit of the sums awarded as compensation for the property proposed to be taken, and by so doing it loses none of its rights under ordinance providing for such extension.—Post Printing & Publishing Co. et al. v. City and County of Denver, Col., 189 Pac. 39.

35. **Equity**—Jurisdiction.—As a general equitable principle, jurisdiction of equity, once existing, is not lost because the courts of law have subsequently acquired a like authority.—

Harris v. Esperanza Mining Co., N. J., 109 Atl. 826.

36. **Execution**—Redemption.—The interest of a purchaser of land at foreclosure of mortgage is not subject to levy and sale prior to expiration of the period for redemption.—Bailey v. Erney, Col., 189 Pac. 18.

37. **Fraud**—Attorney Fees.—Attorney fees are not recoverable in a tort action based upon fraud.—Baird v. Gibberd, Idaho, 189 Pac. 56.

38.——Elements Stated.—The elements of a cause of action for fraud are representation, falsity, scienter, deception and injury.—Bouxsein v. First Nat. Bank of Granville et al., Ill., 127 N. E. 133.

39. **Fraudulent Conveyances**—Existing Creditors.—To constitute a valid conveyance against existing creditors, it is necessary, not only that the consideration be valuable, but also adequate in the eye of the law.—Jones v. Williams, Vt., 109 Atl. 803.

40.——Husband and Wife.—Where a judgment debtor conveyed all his tangible assets to a corporation, receiving in exchange preferred and common stock of the corporation, a transfer of the common stock without consideration to his wife was a fraud on the judgment debtor and voidable by him.—Harnau v. Haight et al., Mich., 177 N. W. 281.

41. **Homicide**—Instructions.—In a prosecution for manslaughter, where it appeared that decedent in company with defendants was shot and killed by some unknown person when he and defendants were engaged in committing highway robbery, an instruction that, if several persons conspire to do an unlawful act and death occurs in the prosecution of the common object, all are guilty of the homicide, the act of one in furtherance of the common design being the act of all, was erroneous, since under it defendants might be held responsible for shooting done by another person when there was no concert of action between him and them.—People v. Garippo et al., Ill., 127 N. E. 75.

42. **Husband and Wife**—Community Property.—The mere fact that land conveyed to wife was paid out of community property was not in itself sufficient to warrant conclusion that the land became community and not wife's separate property.—Zellner v. Samuelson et al., Tex., 220 S. W. 587.

43.——Survivorship.—Where title to standing timber was in husband and wife as tenants by the entirety, after the husband died the wife took title, as survivor, to not only the standing timber but also the logs and lumber severed from the soil before the husband's death; such severance not affecting the application of the rules of tenancy by the entirety.—Morris v. Morris, Mich., 177 N. W. 266.

44. **Indictment and Information** — Principal and Accessory.—Defendant charged as a principal can be convicted as an accessory.—Mulligan v. People, Col., 189 Pac. 5.

45. **Injunction**—Foreign Jurisdiction.—Where complainants seek to restrain defendant from suing them in a foreign jurisdiction, the restraint will be granted if complainants clearly show that the prosecution of the foreign suit is against equity and good conscience.—Grover v. Woodward, N. J., 109 Atl. 822.

46. **Insurance**—Change of Beneficiary.—The insured may pledge policy to the company for loan without the consent of the beneficiary, where it appears that insured reserved the right to change the beneficiary. Beneficiary has no vested right in the proceeds of such policies.—Lamar Life Ins. Co. v. Moody, Miss., 84 So. 135.

47.——Estoppel.—Waiver as applied to defenses to actions on insurance policies is bottomed on the doctrine of estoppel.—Ruddock v. Detroit Life Ins. Co., Mich., 177 N. W. 243.

48.——Forfeiture.—An express provision in a policy of life insurance that if the premium or premium notes are not paid in accordance with the terms of the policy the same shall be void is enforceable, in the absence of a statutory enactment to the contrary.—New England Mut. Life Ins. Co. of Boston, Mass., v. Brooks, Ind., 127 N. E. 17.

49.——Iron Safe Clause.—The warranty commonly called the "iron safe clause" in a fire insurance policy covering a stock of merchandise is a material provision of the contract of insurance as the method adopted by the contracting parties of determining the amount of loss, and must be substantially complied with.—Albert v. Colonial Fire Underwriters of Hartford, Conn., W. Va., 102 S. E. 859.

50. **Landlord and Tenant**—Election.—Where a lease gives a tenant option to extend the term for one of several periods named, there can be but one election, and, if the tenant holds over beyond the original term without notice which period he desires, he will be deemed to hold over for the shortest period.—Anderson v. Dodsworth, Ill., 127 N. E. 43.

51.——Restrictions.—Landlord in absence of lease restrictions cannot permit signs or advertisements of other parties to be placed against the will of tenants on outside walls of part of building leased.—Hilburn v. Huntsman et al., Ky., 220 S. W. 528.

52.——Tenancy at Will.—A tenant at will is entitled to two months' notice before he is subject to eviction.—Salios v. Swift, Ga., 102 S. E. 869.

53. **Larceny**—Intent.—To establish the crime of larceny, it is not essential that accused intended to benefit from the taking.—State v. Allen, Utah, 189 Pac. 85.

54. **Libel and Slander**—Slander of Title.—The utterance of false and malicious statements, disparaging the title to property in which one has an interest, if the statements are untrue and cause damage, constitutes slander of title. Maliciously filing for record an instrument known to be inoperative is a false and malicious statement within the rule, but where a man does no more than file for record an instrument which he has a right to file, he commits no wrong.—Kelly v. First State Bank of Rothsay et al., Minn., 177 N. W. 347.

55. **Liens**—Equitable Lien.—The courts have been strict in demanding as a condition to the establishing and enforcing of an equitable lien that the intention of the parties should be clearly found expressed in the contract, without vagueness or uncertainty.—Westinghouse Electric & Mfg. Co. v. Brooklyn Rapid Transit Co. et al., U. S. C. C. A., 263 Fed. 532.

56. **Marriage**—Mutual Consent.—The two essentials of a valid "marriage at common law" are capacity and mutual consent, and it is well settled that under the common law the marriage relation may be formed by words of present assent, per verba de praesenti, and without the interposition of any person lawfully authorized to solemnize marriages, or to join persons in marriage.—Marsicano v. Marsicano, Fla., 84 So. 156.

57. **Master and Servant** — Agency.—Where the agent of a threshing machine company, whose duty required him to see that the new thresher worked satisfactorily, took entire charge of the threshing operation, he is liable for damage resulting from a fire started by the operation of the machine without a spark arrester.—Cronkhite et al. v. Whalen, Wash., 189 Pac. 94.

58.——Assumption of Risk.—An employe assumes the risk of an injury caused by defects in his employer's instrumentalities, of which he either knows or is in fault for not knowing.—Paquette v. Connecticut Valley Lumber Co., N. H., 109 Atl. 836.

59.——Course of Employment.—Where a construction company's employe working by the hour with 30 minutes' intermission for dinner fell from a ladder, used in the work because a

rung revolved under pressure while he was going up to eat his lunch at the customary place, he was on the premises with the implied invitation of the company, so that, if it knew of the defect and failed to warn him thereof, it was liable for his injuries.—Boner v. Eastern Michigan Power Co., Mich., 177 N. W. 225.

60.——Violation of Rules.—The violation by railroad employe of the company's rules is not necessarily negligence, and the employe is justified in violating the rule where to follow it would accomplish disaster.—Howell v. Southern Ry. Co., S. C., 102 S. E. 856.

61.——Workmen's Compensation Law.—Courts cannot look for the same precision in adjudications by the Workmen's Compensation Board as otherwise might be insisted on if the members were required to be learned in the law.—Whittle v. National Aniline & Chemical Co., Pa., 109 Atl. 847.

62. **Mines and Minerals**—Forfeiture.—The law applies the rule of strict construction, when a forfeiture is claimed for the breach of a condition subsequent in a conveyance of an interest in minerals in land.—Tickner v. Luse, Tex., 220 S. W. 578.

63.——Interest in Land.—A conveyance of an interest in the oil, gas and minerals in and under a tract of land is a conveyance of an "interest in the land."—Crabb et ux. v. Bell et al., Tex., 220 S. W. 623.

64. **Mortgages**—Redemption.—The interest or estate of the mortgagor in land mortgaged being but an equity of redemption, when a second mortgage is given such equity is the only estate the second mortgagee acquires an interest in.—Gregory v. Suburban Realty Co., Ill., 127 N. E. 119.

65. **Municipal Corporations**—Prescription.—To establish a highway by prescription, the user must be adverse, open, and notorious, exclusive, continuous, and uninterrupted, for the period required by the statute.—Tri-City Artificial Ice Co. et al. v. Day, Ill., 127 N. E. 106.

66. **Parent and Child**—Rights of Father.—The father has the right to the control and custody of his child, unless he has forfeited this right by immoral conduct, or by an abandonment of the child.—Nickle v. Burnett, Miss., 84 So. 138.

67. **Partnership**—Undisclosed Partner.—One making contract in his own name for benefit of himself and an undisclosed partner may sue for the benefit of himself and partner and recover the full amount of the damages.—Bankers Trust Co. v. Schulze, Tex., 220 S. W. 570.

68. **Principal and Agent**—Proof of Agency.—One dealing with an agent is bound to ascertain the nature and extent of his authority.—Texas Co. v. Quelquejeu, U. S. C. C. A., 263 Fed. 491.

69.——Proof of Agency.—Agency may be proved by testimony of the alleged agent as a witness.—Mackle Const. Co. v. Hotel Equipment Co., Ga., 102 S. E. 868.

70. **Principal and Surety**—Substantial Breach.—A surety, though one for profit, is relieved of liability where the assured has substantially breached the contract to the damage of the surety.—Berkshire Land Co. v. Moran et al., Mich., 177 N. W. 205.

71. **Release**—Executed Agreement.—In the absence of fraud or mistake, the executed agreement of settlement made by a railroad company with one injured while in the employment of the company constitutes as conclusive and as effectual an estoppel against the party seeking to repudiate the settlement thus made as the final judgment of a court of competent jurisdiction, to the effect that the rights of the parties are as they are set forth in the agreement. The burden is always upon the assailant of the contract to establish the vice which he alleges induced him, and a bare preponderance of evidence will not sustain the burden. A written agreement of settlement and release will not be rescinded for fraud or mistake, unless the evidence of the fraud or mistake is clear and convincing.—Midland Valley R. Co. v. Clark, Okla., 189 Pac. 183.

72. **Remainders**—Livery of Seisin.—At common law, an estate in remainder could not be aliened by livery of seisin, for to transfer land by that method possession is indispensable.—Real Estate Title Ins. & Trust Co. of Philadelphia v. Dearborn, Me., 109 Atl. 816.

73. **Sales**—Rescission.—A buyer does not waive his right to rescind a contract for the purchase of an organ by making payments induced by promise to fix the organ and by delaying rescission at the request of seller.—Ray v. American Photo Player Co., Cal., 189 Pac. 130.

74.——Samples.—Where jewelry sold according to sample did not, with the exception of a few of the articles on top in the carton, correspond with the samples, buyer was not required to keep the jewelry conforming to sample, but could reject all of the jewelry, the rule requiring buyer to accept goods corresponding to sample having no application, where only a nominal part of the items or quantity of the goods corresponds thereto.—National Novelty Import Co. v. Ellis, Ark., 220 S. W. 467.

75.——Tender.—In an action of trespass on the case for conversion of an automobile, where it appeared that when plaintiff attempted to tender defendant the amount of the purchase price owing thereon defendant refused to accept it and left, plaintiff's actions were all that were necessary or possible to comply with the necessity of tender or demand.—Wright v. Dwight, Mich., 177 N. W. 209.

76. **Set-Off and Counterclaim**—Pleading.—For an answer to state a counterclaim entitling defendants to judgment on plaintiffs' failure to reply thereto, it must set up a cause of action which defendant could have maintained in an independent suit against plaintiff.—Turner v. Southeastern Grain & Live Stock Co., N. C., 102 S. E. 849.

77. **Specific Performance** — Option.—Waiver by the vendor of the exercise of his option of forfeiture, thus continuing the contract, and its abrupt cancellation without notice, puts the vendor, in a measure, in default, making it unnecessary for the vendee to make further tender.—Gannaway v. Toler et al., Miss., 84 So. 129.

78. **Wills**—Construction.—Words will not be read into a will unless it is certain beyond a reasonable doubt that the testator has not expressed himself as he intended and supposed he had done.—In re McConnell's Estate, Pa., 109 Atl. 846.

79.——Lex Rei Sitae.—The validity and construction of wills affecting title to land depend upon the law of the state where the land is situated.—McNamara et al. v. McNamara et al., Ill., 127 N. E. 130.

80.——Reversion.—When a remainder devised in fee is limited in contingency, the reversion remains in the heirs of the testator until the happening of the event designated in the will for taking it out of them.—City Savings Bank & Trust Co. of Vicksburg v. Cortright, Miss., 84 So. 136.

81.——Testamentary Capacity.—One possesses "testamentary capacity" whose mind and memory are sound enough to enable him to know and understand the business in which he is engaged when he executed a will, notwithstanding failing memory and mental and physical powers from old age.—Dripps v. Meader, Conn., 109 Atl. 808.

82. **Witnesses** — Cross-Examination.—Cross-examination of witnesses is to some extent within the discretion of the court.—People v. Miller, Ill., 127 N. E. 58.